



# **Tribal Reserved Rights**

EPA's Experiences and Implications for Water Quality Standards Programs

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## Outline

- Tribal Reserved Rights in WQS Context
- Opportunities During Consultation with EPA and During State Public Comment Periods on Proposed State WQS
- Case Studies
- Resources

## Tribal Reserved Rights in WQS Context

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### "Fishable/Swimmable" goals

- The "fishable" uses under section 101(a) of the CWA include designated uses providing for the protection of:
  - Aquatic communities
  - Human health related to consumption of fish and shellfish

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numeric levels or narrative statements describing a quality of water sufficient to protect applicable designated uses

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framework for maintaining and protecting  
water quality that has already been achieved

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  - "Criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use."
- Any new or revised WQS must be submitted to EPA for review and approval or disapproval
  - If disapproval: state/tribe has 90 days to adopt a revised WQS that meets CWA requirements
  - If state or tribe fails to do so: EPA shall propose and promulgate such standards <sup>12</sup>

## Tribal Reserved Rights in WQS Context (3)

- Tribal reserved rights relating to natural resources may be affected by EPA WQS actions in specific geographic areas.
- The U.S. Constitution defines treaties as part of the supreme law of the land, with the same legal force as federal statutes.
- CWA section 511 provides that:  
    "[The Act] shall not be construed as . . . affecting or impairing the provisions of any treaty of the United States."

## Tribal Reserved Rights in WQS Context (3)

For example:

- To protect people from pollutants in fish and shellfish, states and tribes establish human health criteria (HHC) for their "fishable" waters.
- EPA's 2000 Human Health Methodology
  - Guidance for developing HHC
  - Contains recommendations for various HHC input factors

e.g. fish consumption rate (FCR) and cancer risk level (CRL)

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**Fishing for subsistence purposes** may be affected by the human health criteria derived to protect people from cancer and non-cancer effects from pollutants in drinking water and fish and shellfish.

**Hunting or gathering aquatic-dependent wildlife or plants** may be affected by the types and levels of protection for those waters.

## Tribal Reserved Rights in WQS Context (4)

- During consultation with federally recognized tribes on WQS decisions under the CWA, EPA seeks information and recommendations on tribal reserved rights.
  - Helps identify the locations and scope of treaty-protected resources, and how those resources may be impacted by EPA's action
  - Helps ensure that EPA is fully informed when it makes WQS decisions

## Opportunities During Consultation with EPA and During State Public Comment Period

1. Any treaties that exist within the specific geographic area of the WQS action.
  - Tribes may possess treaty rights both inside the boundaries of reservations and outside, under areas of state jurisdiction.
2. Any treaty rights that exist in, or treaty-protected resources that rely upon, the specific geographic area of the WQS action.
  - For example, a treaty may reserve or protect the right to "hunt," "fish," or "gather" a particular animal or plant in specific areas.
  - Treaties also may contain necessarily implied rights.
3. How treaty rights may be affected by application of the WQS.
4. Any recommendations for EPA and the relevant state(s) to consider to ensure a treaty right is protected.

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Example: implied right to sufficient water quantity or water quality to ensure that fishing is possible, or a guarantee of access to the activity site.

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  4. Any recommendations for EPA and the relevant state(s) to consider to ensure a reserved right is protected.
- Next steps typically will involve conducting legal and policy analyses in order to determine how to protect the rights, which will depend upon the context and circumstances of the particular situation.

# Case Studies

## Washington and Maine

- As noted earlier, EPA interprets the "fishable" uses under section 101(a) of the CWA to provide that fish and shellfish must be safe for human consumption.
- **Washington**
  - Where tribes have off-reservation reserved rights to fish for subsistence purposes, the "fishable" uses under section 101(a) of the CWA must be interpreted to provide that fish and shellfish must be safe for human consumption **at subsistence levels** state-wide.
  - Right to fish for subsistence and sufficient water quality to effectuate the fishing right.
  - This position is supported by a February 2015 written legal opinion from the Solicitor of the U.S. Department of the Interior to EPA (the opinion analyzed rights of tribes in ME, but is also relevant to tribes with reserved fishing rights in WA).
- **Maine**
  - EPA took a similar position for a more limited scope of waters.
- **EPA's approach**
  - Harmonize these rights with the CWA by interpreting Washington and Maine's "fishable" designated uses to include fishing for subsistence (Washington) or sustenance (Maine).

## Case Studies

## Designated use(s)

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## Criteria

### Case Studies (2)

- In 2015 and 2016: EPA determined that human health criteria for WA and ME waters where reserved rights apply must be based on fish consumption rates (FCRs) reflective of tribal subsistence/sustenance consumption.

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- EPA also concluded that:
  1. the tribes must be considered the target general population for purposes of developing the criteria needed to protect the use, and
  2. the FCR must be set at the target population's current, unsuppressed subsistence/sustenance fishing practices.
    - EPA defines suppression as: The reduction in desired intake or consumption due to environmental or other factors beyond the control of a population.
    - EPA's 2016 Guidance for Conducting Fish Consumption Surveys provides recommended methods to estimate an unsuppressed FCR, including: estimate historic or heritage rates, use data from similar populations that reside in less impacted areas, ask questions related to suppression in a current FCR survey.

## Case Studies (3)

- **Washington**

- Several fish consumption surveys conducted in Washington and neighboring states.
- Results: **175 g/day** was an acceptable FCR for fish consumers in Washington, including subsistence consumers such as Pacific Northwest tribes.
- In 2011, EPA approved human health criteria in **Oregon** that were based on this same FCR.

- **Maine**

- Wabanaki Study
- Results: **286 g/day** FCR for tribal sustenance fish consumption, based on historic, archeological, and anthropological evidence.

***Washington and Maine now have CWA-effective human health criteria that are protective of tribes with reserved fishing rights.***

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## Resources

- Engage early with EPA and the relevant state(s), providing as much specific information about applicable reserved rights as possible.
- Review relevant EPA guidance:
  - EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights (February 2016), [https://www.epa.gov/sites/production/files/2016-02/documents/tribal\\_treaty\\_rights\\_guidance\\_for\\_discussing\\_tribal\\_treaty\\_rights.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf)
  - Guidance for Conducting Fish Consumption Surveys (December 2016), [https://www.epa.gov/sites/production/files/2017-01/documents/fc\\_survey\\_guidance.pdf](https://www.epa.gov/sites/production/files/2017-01/documents/fc_survey_guidance.pdf)
- Review documents associated with WA and ME case studies:
  - Revision of Certain Federal Water Quality Criteria Applicable to Washington (November 2016), <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-washington>
  - Promulgation of Certain Federal Water Quality Standards Applicable to Maine (December 2016), <https://www.epa.gov/wqs-tech/promulgation-certain-federal-water-quality-standards-applicable-maine>

## Contact

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